

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUTHIE M. HALL

Claimant

VS.

DILLON COMPANIES, INC.

Self-Insured Respondent

Docket No. **1,016,251**

ORDER

Claimant requested review of the January 14, 2009 Award On Post Award Medical by Administrative Law Judge Pamela J. Fuller. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award On Post Award Medical.

ISSUES

Claimant suffered bilateral carpal tunnel syndrome as a result of her repetitive work activities for respondent. On June 1, 2007, the Administrative Law Judge (ALJ) awarded claimant compensation based upon a 10 percent impairment to each upper extremity at the forearm for two separate scheduled disabilities pursuant to K.S.A. 44-510d. The Board affirmed the ALJ's Award on September 27, 2007. Claimant's attorney filed a Notice of Appeal with the Court of Appeals on October 26, 2007. On March 5, 2008, the case was transferred to the Supreme Court. A Supreme Court decision affirming the Board was filed on July 25, 2008.

On November 6, 2007, claimant's attorney filed an application for post award medical with the Division. A post award medical hearing was held on May 9, 2008.

On January 14, 2009, the Administrative Law Judge (ALJ) found that claimant has failed to sustain her burden of proof that she is in need of additional medical treatment and therefore denied claimant's request for additional treatment.

Claimant requests review of whether the ALJ erred in denying claimant's request for additional medical treatment.

Respondent argues the ALJ's Award On Post Award Medical should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked nine years as a deli clerk for the respondent. She had to load and unload chicken into a frier continuously all day long. After claimant's injury on October 28, 2001, she was placed in an accommodated job working as a cashier for approximately a year and then returned to the deli department. She testified she did not suffer a new injury after being released to return to full-time work. Claimant was terminated from her employment with respondent in January 2004. When the evidence in this case was submitted the claimant was a full-time employee working as a deli clerk at a Wal-Mart store.

The underlying Award in this case was for two scheduled disabilities caused by claimant's work-related bilateral carpal tunnel syndrome. During the litigation of the case there had been recommendations that claimant have a surgical consult for her condition but claimant had reservations about undergoing surgery and did not pursue such a consult. Consequently, the case had proceeded to an Award which provided that claimant could seek future medical treatment only upon proper application and approval. The claimant filed an application for post award medical on November 6, 2007, requesting a consultation with an orthopedic surgeon specializing in hand surgery.

Claimant testified at the post award medical hearing that she had not suffered a work injury while working for Wal-Mart. And she noted that the deli work at her current employer was easier than when she performed that job for respondent. Claimant further testified that the pain in her hands had not changed since its onset in 2001. But that she is simply tired of dealing with the pain since her original injury and wants to pursue any treatment options including surgery.

Claimant testified:

Q. And at that time, or in fact, prior to those hearings, there was some discussion about having surgery or seeing a surgeon for your hands?

A. Yes.

Q. And, in fact, those recommendations existed from the very beginning of your case?

A. Yes.

Q. But you didn't pursue it because you had some reservations?

A. Yes.

Q. And it's my understanding that now you want to at least go to a hand surgeon to see if anything can be done?

A. Yes.¹

On cross-examination, claimant testified that the pain has not gotten any better or worse, that it is still the same. She did not recall telling Dr. C. Reiff Brown that the pain and weakness in her hands seems to be worsening somewhat. She is now interested in having surgery to both arms.

During the litigation of the underlying Award, claimant had been examined and evaluated by Dr. C. Reiff Brown on March 7, 2006, at the ALJ's request. Upon physical examination, Dr. Brown found claimant had a sensory deficit in the median distribution of both hands as well as a notable grip strength loss bilaterally. Dr. Brown opined claimant had bilateral carpal tunnel syndrome that resulted from prolonged work activity while employed with the respondent. The doctor placed the following restrictions on the claimant: (1) permanently avoid work that involves frequent flexion and extension of the wrist greater than 30 degrees; (2) avoid repeated grasp-type activities on a frequent basis; and, (3) avoid frequent use of vibrating hand tools. Dr. Brown recommended claimant see an orthopedic surgeon for a possible surgical intervention. He further opined that if claimant did not have surgery she had reached maximum medical improvement. Based on the AMA *Guides*², Dr. Brown rated claimant's mild bilateral carpal tunnel syndrome to be 10 percent for each upper extremity.

As part of the instant litigation and at the request of claimant's attorney, Dr. C. Reiff Brown, retired board certified orthopedic surgeon, again examined claimant on January 8, 2008. Dr. Brown recorded a history that in the interim since he had last examined claimant in 2006 she had continued to perform repetitive work in a deli at Wal-Mart. And that claimant continued having pain and weakness in her hands which seemed to be increasing

¹ P.A.H. Trans. at 5-6.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

somewhat. Dr. Brown again determined that claimant had bilateral carpal tunnel syndrome as had been demonstrated by a nerve conduction study performed by Dr. Almsaddi in April 2003. Dr. Brown again opined that claimant should be referred for additional nerve conduction studies as well as referred to an orthopedic surgeon for surgical consultation.

On cross-examination Dr. Brown agreed that on physical examination there was no swelling, inflammation or atrophy in the thenar, hypothenar or intrinsic muscle areas. Dr. Brown further agreed that claimant did not have any muscle atrophy when he had examined her in 2006. In 2006, Dr. Brown had determined that claimant had bilateral severe grip strength weakness and he made the same determination in 2008. Likewise, Dr. Brown noted claimant had a bilateral weakly positive Tinel's sign in both 2006 and 2008. Dr. Brown concluded that claimant's physical examinations in 2006 and 2008 were essentially the same.

Dr. Brown testified:

Q. And did you draw upon -- what was your conclusions on January 8th, 2008?

A. It was still my opinion that she had bilateral carpal tunnel syndrome. It had been demonstrated electrophysiologically by a nerve conduction study that Dr. Almsaddi did in April of 2003. I felt that she should be referred to an orthopedic surgeon for surgical consultation.

Q. Okay. Did you also recommend that she may need additional nerve conduction studies?

A. Yes.

Q. Did you relate that treatment to the work at Dillon's?

A. Yes.³

Dr. Brown testified that claimant's condition, mild bilateral carpal tunnel syndrome, unoperated, remains essentially the same since 2006. The doctor opined that claimant might benefit from steroid injections into the carpal tunnel or carpal tunnel release surgery. Dr. Brown testified claimant's permanent restrictions should remain the same.

Respondent referred claimant to be examined by Dr. J. Mark Melhorn on October 14, 2006. Dr. Melhorn recommended that a current nerve conduction study be performed in order to determine whether claimant does or does not continue to present with bilateral carpal tunnel syndrome. Nerve conduction studies were performed on October 14, 2008. Dr. Melhorn noted that the most current nerve conduction studies

³ Brown Depo. (May 16, 2008) at 53.

demonstrated a normal pattern that did not support a diagnosis of carpal tunnel. Dr. Melhorn further noted claimant's subjective complaints of bilateral hand and wrist pain might represent a muscle tendonitis irritation component which would explain her persistent symptoms which have not progressed since 2001. But Dr. Melhorn concluded the nerve conduction studies did not support a diagnosis of carpal tunnel.

In claimant's request for post-award medical treatment, she has the burden to prove her right to an award of compensation and prove the various conditions on which her right depends.⁴ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁵

As noted, the claimant has the burden of proof to establish that her need for post-award medical treatment is causally related to the injury suffered in the underlying accident. That burden remains the same even if claimant has suffered intervening accidents. It is simply a matter of proof. And although the passage of time and intervening accidents may increase the claimant's difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

Claimant testified her condition has remained the same since 2001 and that she is now finally ready to seek consultation for additional treatment including surgery. In her Application for Post Award Medical the claimant requested a consultation with an orthopedic surgeon specializing in hand surgery.

Dr. Brown opined that claimant should be referred for a surgical consultation and further noted that additional nerve conduction testing would need to be conducted. On October 14, 2008, that additional nerve conduction testing was performed and the results were read as normal. Dr. Melhorn opined that the nerve conduction study did not support a diagnosis of carpal tunnel syndrome.

The ALJ analyzed the evidence in the following fashion:

The claimant's Application for Post Award Medical specifically requested: Consultation by an orthopedic surgeon specializing in hand surgery who performs the procedures by endoscopic methods. The claimant was sent to Dr. Melhorn for an evaluation. Nothing presented indicates that he did not meet the claimant's specifications. The claimant testified that she was tired of dealing with the pain and just wanted to see if they (her hands) could be fixed. Dr. Melhorn did not make any

⁴ K.S.A. 44-501(a).

⁵ K.S.A. 44-510k(a).

treatment recommendations at this time. Therefore, no additional medical treatment will be ordered at this time.⁶

The Board agrees with the ALJ's analysis. The claimant requested a surgical consultation and her medical expert not only suggested a surgical consultation but also noted that additional nerve conduction studies would need to be performed. The additional nerve conduction studies were performed and Dr. Melhorn provided a surgical consultation. The claimant received exactly what she had sought in her request for post-award medical treatment. Consequently, there was and is no remaining justiciable controversy.

Moreover, based on the record compiled to date, claimant has not met her burden of proof to establish that she needs additional medical treatment.

AWARD

WHEREFORE, it is the decision of the Board that the Award on Post Award Medical of Administrative Law Judge Pamela J. Fuller dated January 14, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of March 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Scott J. Mann, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge

⁶ ALJ Award (Jan. 14, 2009) at 3.